

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





ORIGINAL

# 75-7685

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## United States Court of Appeals FOR THE SECOND CIRCUIT

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GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND  
BENOIT, BERNARD BERKOWITZ, JOHN BLANDE-  
BURGO, DAVID CAMPBELL, OTTAVIO FAZIO, HARRY  
FINNIGEN, ROBERT GORDON, JOHN GROGAN, JOSEPH  
HIGGINS, KENNETH KRAUS, JOSEPH LAMENDOLA,  
LOUIS LINHART, THOMAS LONGOBARDI, LEONARD  
MALLON, FRANCIS McCALL, DANIEL McCARTHY,  
WILLIAM McCARTHY, FREDERICK MOONEY, GEORGE  
NORTON, JOHN J. O'BRIEN, GEORGE ODONITS, VIN-  
CENT SALAMONE, DOMINICK SANSOSTI, SANTO  
SFOGLIANO, ERNEST SLAGUS, WALTER SLUTSKY,  
STANLEY STRYJEWSKI, VINCENT TUMMARELLO and  
EUGENE VAUGHAN,

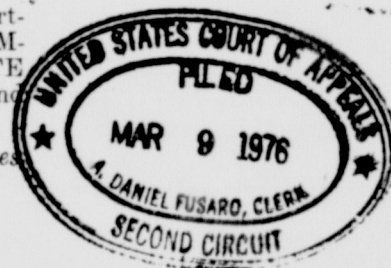
*Plaintiffs-Appellants,*

*against*

JAMES H. TULLY, Jr., Commissioner, New York State Depart-  
ment of Taxation and Finance; NEW YORK STATE EM-  
PLOYEES' RETIREMENT SYSTEM; NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE, and  
ARTHUR LEVITT, Comptroller, State of New York,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK



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### APPENDIX

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SAMUEL FESNICOFF, Esq.  
*Attorney for Plaintiffs-Appellants*  
280 Broadway  
New York, N. Y. 10007  
DIgby 9-3896

HON. LOUIS J. LEFKOWITZ  
*Attorney General, State of New York*  
*Attorney for Defendants-Appellees*  
The Capitol  
Albany, N. Y. 12224

PAGINATION AS IN ORIGINAL COPY

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## Relevant Docket Entries

75-CV-270

DATE 1975	NR.	PROCEEDINGS
June 2	1	Filed certified copy of Order of Judge Werker transferring case from Southern District of New York to N. D. of N.Y.
" 2	2	Filed certified copy of docket entries
" 2	3	Filed complaint
" 2	4	Filed Marshal's return of summons
" 2	5	Filed Minutes of Pretrial Conference
Sept. 24	6	Filed Notice of Motion, returnable October 6, 1975 at Albany & Affidavit of John F. Grogan
Oct. 3	7	Filed Notice of Motion returnable October 20, 1975 at Albany <del>Motion heard by Judge Foley on Oct. 6 Decision Reserved</del>
Oct 6	8	Filed Memo of Law By Defendant
Oct. 6		Motion for an order convening a Three-Judge Court, by plaintiffs. Motion to dismiss complaint (returnable Oct. 20, 1975-heard today)- Decision Reserved. 10 days for plaintiff to reply to defendant's brief
Oct. 17	9	Filed Memorandum of Law in Support of Motion to Dismiss the Complaint
Oct. 22	10	Filed Answer of Louis J. Lefkowitz
Oct. 24	11	Filed stipulation that the New York City Police Department Pension Fund, Article II, shall file in this proceeding, Amicus Curiae memoranda of law in support of defendants
Nov. 14	12	Filed Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss Complaint
Nov. 14	13	Filed Memorandum-Decision and Order of Judge Foley (11/13/75) denying plaintiffs motion for a three-judge court and granting defendant's motion to dismiss the complaint
Nov. 14	14	Filed Judgment and mailed cards re: Judgment to Samuel Resnicoff, Esq., Louis J. Lefkowitz, Attorney General and W. Bernard Richland, Esq.
Dec. 10	15	Filed Notice of Appeal of plaintiffs
" 10	16	Filed Designation of Papers to be Used on Appeal

Stipulation Agreeing to  
Transfer The Action to The  
United State District Court for the Northern District

UNITED STATES DISTRICT COURT  
For The  
SOUTHERN DISTRICT OF NEW YORK

-----  
GEORGE T. BRAVY, et al.,

Plaintiffs,

- against -

JAMES H. TULLY, JR., Commissioner,  
New York State Department of Taxation  
and Finance; NEW YORK STATE EMPLOYEES'  
RETIREMENT SYSTEM; NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE,  
and ARTHUR LEVITT, Comptroller, State  
of New York,

75 CIV. 1770


Defendants.  
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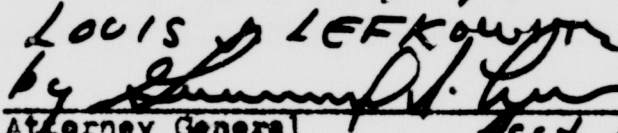
IT IS HEREBY STIPULATED AND AGREED by and between the  
attorneys for the respective parties herein that the above-  
entitled action be and the same is hereby transferred to the  
UNITED STATES DISTRICT COURT for the NORTHERN DISTRICT OF NEW  
YORK, and that an order to that effect may be entered without  
costs to either side.

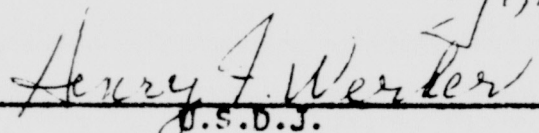
## Stipulation

IT IS FURTHER STIPULATED AND AGREED by and between the attorneys for the respective parties herein that the defendants' time to interpose an answer to the complaint be and the same hereby is extended sixty (60) days from the date hereof.

DATED: New York, April 30, 1975.

  
Attorney for Plaintiffs

LOUIS A. LEFKOWITZ  
by   
Attorney General  
Attorney for Defendants. ASST R. G.

SO ORDERED: May 1, 1975  
  
U.S.D.J.



## Summons

UNITED STATES DISTRICT COURT  
for the  
SOUTHERN DISTRICT OF NEW YORK

-----  
GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND BENOIT,  
BERNARD BERKOWITZ, JOHN BLANDEBURGO, DAVID CAMPBELL,  
OTTAVIO FAZIO, HARRY FINNIGEN, ROBERT GORDON,  
JOHN GROGAN, JOSEPH HIGGINS, KENNETH KFAUS, JOSEPH  
LAMENDOLA, LOUIS LINHART, THOMAS LONGOBARDI,  
LEONARD MALLON, FRANCIS McCALL, DANIEL McCARTHY,  
WILLIAM McCARTHY, FREDERICK MOONEY, GEORGE NORTON,  
JOHN J. O'BRIEN, GEORGE ODONITS, VINCENT SALAMONE,  
DOMINICK SANSOSTI, SANTO SFOGLIANO, ERNEST SLAGUS,  
WALTER SLUTSKY, STANLEY STRYJEWSKI, VINCENT  
TUMMARELLO and EUGENE VAUGHAN,

Plaintiffs,

- against -

JAMES H. TULLY, JR., Commissioner, New York  
State Department of Taxation and Finance;  
NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM;  
NEW YORK STATE DEPARTMENT OF TAXATION AND  
FINANCE, and ARTHUR LEVITT, Comptroller, State of New  
York,

Defendants.

SUMMONS

Civil  
Action  
No. \_\_\_\_\_

-----  
TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to serve upon

SAMUEL RESNICOFF

plaintiffs' attorney whose address is

280 Broadway  
New York, N.Y. 10007

an answer to the Complaint which is herewith served upon you  
within twenty days after service of this summons upon you,

## Summons

exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Raymond F. Burghardt  
Clerk of Court

E. A. Becker  
Deputy Clerk

(Seal of Court)

DATED: April // 1975.



## Complaint.

UNITED STATES DISTRICT COURT  
for the  
SOUTHERN DISTRICT OF NEW YORK

-----

GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND BENOIT,  
BERNARD BERKOWITZ, JOHN BLANDEBURGO, DAVID CAMPBELL,  
OTTAVIO FAZIO, HARRY FINNIGAN, ROBERT GORDON,  
JOHN GROGAN, JOSEPH HIGGINS, KENNETH KRAUS, JOSEPH  
LAMENDOLA, LOUIS LINHART, THOMAS LONGOBARDI,  
LEONARD MALLON, FRANCIS McCALL, DANIEL McCARTHY,  
WILLIAM McCARTHY, FREDERICK MOONEY, GEORGE NORTON,  
JOHN J. O'BRIEN, GEORGE ODONITS, VINCENT SALAMONE,  
DOMINICK SANSOSTI, SANTO SFOGLIANO, ERNEST SLAGUS,  
WALTER SLUTSKY, STANLEY STRYJEWSKI, VINCENT  
TUMMARELLO and EUGENE VAUGHAN,

Plaintiffs,

Civil Action  
No.

- against -

JAMES H. TULLY, JR., Commissioner, New York  
State Department of Taxation and Finance;  
NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM;  
NEW YORK STATE DEPARTMENT OF TAXATION AND  
FINANCE, and ARTHUR LEVITT, Comptroller, State  
of New York,

Defendants.

-----

PRELIMINARY STATEMENT

1. All of the plaintiffs who are honorably discharged veterans are retired Police Officers, Police Department, City of New York, and have been and still are receiving a pension from the New York City Police Department Pension Fund, having made contributions to said pension system while employed as Police Officers.

2. All of the plaintiffs successfully competed in an open competitive written examination for the position of Excise Tax Investigator, New York State Department of Taxation and

## Complaint

Finance, and were permanently appointed from an eligible list to said position, except that plaintiff EUGENE VAUGHAN was subsequently promoted to the position of Senior Excise Tax Investigator.

3. All of the positions occupied by plaintiffs in the New York State Department of Taxation and Finance are in the competitive class and plaintiffs have tenure and a property interest in said positions.

4. Although plaintiffs are permanently employed, defendants have failed and refused to permit them to become members of the New York State Employees' Retirement System, and have failed and refused to make contributions on behalf of plaintiffs in the New York State Employees' Retirement System.

5. Several of the plaintiffs have been advised by defendants that in order for them to continue their employment as Excise Tax Investigators with defendant New York State Department of Taxation and Finance, it will be necessary for each plaintiff in writing to waive his right to receive his New York City pension.

6. Plaintiffs seek to have this Court pursuant to 28 U.S.C. Sections 2281 and 2284 declare invalid and enjoin the enforcement of Sections 40 (e), 210, 211, 212, 213, 214, 215 and 216 of the New York State Retirement and Social Security Law, on the ground that said sections are in violation of plaintiffs' constitutional rights to due process and the equal protection of the laws.

## Complaint

7. The said statutes, and its interpretation and application by defendants are challenged upon the ground that they are in conflict with the provisions contained in the First and Fourteenth Amendments of the Constitution of the United States.

JURISDICTION

8. Jurisdiction is conferred upon the Court as follows:

(a) 28 U.S.C. Section 1331 in that the damages to plaintiffs exceed \$10,000.00 and the matter arises under the United States Constitution, laws and treaties;

(b) 28 U.S.C. Section 1343 (3) (4) in that plaintiffs seek relief under 42 U.S.C. §1981 and §1983 and that plaintiffs allege deprivation under color of state laws, of rights, privileges or immunities secured by the Constitution of the United States or by Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States;

(c) 28 U.S.C. Sections 2281 and 2284;

(d) Sections 1361 and 1391, Title 28, U.S.C.,

(e) Plaintiffs' action for declaratory and injunctive relief and for damages is authorized by:

(1) 28 U.S.C. Sections 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

(2) 42 U.S.C. Section 1983 which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons



## Complaint.

within the jurisdiction of the United States by the Constitution and laws of the United States.

THREE-JUDGE COURT

9. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. Sections 2281, 2284, since plaintiffs seek an injunction to restrain defendants who are for the purpose of this action state officials and state agencies from the enforcement, operation and execution of state statutes of state-wide applicability, on the ground that said statutes are contrary to the Constitution of the United States the supreme law of the land.

STATEMENT OF FACTS

10. All of the plaintiffs herein having completed the required number of years of service as Police Officers, Police Department, City of New York, retired on the following dates with the following rank:

<u>Name</u>	<u>Date of Retirement</u>	<u>Rank</u>
GEORGE T. BRAVY	7-12-71	Patrolman
JOSEPH ANZALONE	4-16-68	Patrolman
RAYMOND BENOIT	1- 1-66	Lieutenant
BERNARD BERKOWITZ	4-13-68	Patrolman
JOHN BLANDEBURGO	2-18-69	Sergeant
DAVID CAMPBELL	5- -72	Detective
OTTAVIO FAZIO	8- -73	Patrolman

## Complaint

HARRY FINNIGAN	8-18-71	Detective
ROBERT GORDON	10-27-73	Patrolman
JOHN GROGAN	2- 1-68	Patrolman
JOSEPH HIGGINS	11-11-66	Sergeant
KENNETH KRAUS	10-31-67	Patrolman
JOSEPH LAMENDOLA	11-25-73	Patrolman
LOUIS LINHART	10-10-70	Patrolman
THOMAS LONGOBARDI	2-28-69	Sergeant
LEONARD MALLON	9-27-66	Lieutenant
FRANCIS McCALL	3- 3-71	Patrolman
DANIEL McCARTHY	2-14-74	Patrolman
WILLIAM McCARTHY	7- 5-67	Detective
FREDERICK MOONEY	4-20-72	Patrolman
GEORGE NORTON	5-31-69	Sergeant
JOHN J. O'BRIEN	8-10-73	Patrolman
GEORGE ODOMITS	8-21-73	Patrolman
VINCENT SALAMONE	10-25-70	Patrolman
DOMINICK SANSOSTI	8-10-73	Patrolman
SANTO SFOGLIANO	11-29-73	Detective
ERNEST SLAGUS	11-12-73	Patrolman
WALTER SLUTSKY	7- 2-70	Patrolman
STANLEY STRYJEWSKI	4- 1-69	Sergeant
VINCENT TUMMARELLO	4-19-74	Patrolman
EUGENE VAUGHAN	7- 63	Patrolman

11a  
Complaint

11. All of the plaintiffs successfully competed in a written competitive examination for the position of Excise Tax Investigator, New York State Department of Taxation and Finance, and in their application forms and all other civil service papers, etc., which plaintiffs prepared and submitted to defendants, they disclosed their prior employment as Police Officers, Police Department, City of New York, and their status as retired pensioners.

12. Although some plaintiffs attained higher marks on the written examination than other candidates competing for the examination who were not retirees from a New York City or New York State pension, defendants, nevertheless, did not certify or appoint said plaintiffs until all candidates who were not such retirees were first canvassed and appointed. Plaintiffs were denied their right to claim veterans preference.

13. All of the plaintiffs were duly appointed from the eligible list to the position of Excise Tax Investigator on the following dates:

<u>Name</u>	<u>Date of Appointment</u>
GEORGE T. BRAVY	11-29-73
JOSEPH ANZALONE	2-15-68
RAYMOND BENOIT	8- 8-67
BERNARD BERKOWITZ	12-15-67
JOHN BLANDEBURGO	11-21-68
DAVID CAMPBELL	5- 3-73
OTTAVIO FAZIO	8-23-73
HARRY FINNIGAN	8-22-73



12a  
Complaint

ROBERT GORDON	8-26-73
JOHN GROGAN	12- 7-67
JOSEPH HIGGINS	12- 7-67
KENNETH KRAUS	7- 2-70
JOSEPH LAMENDOLA	8-23-73
LOUIS LINHART	7- 2-70
THOMAS LONGOBARDI	8-23-73
LEONARD MALLON	12-14-67
FRANCIS McCALL	11-30-70
DANIEL McCARTHY	11-29-73
WILLIAM McCARTHY	5- 3-72
FREDERICK MOONEY	8-23-73
GEORGE NORTON	11-30-70
JOHN J. O'BRIEN	5- 3-73
GEORGE ODONITS	5- 3-73
VINCENT SALAMONE	7- 2-70
DOMINICK SANSOSTI	5-17-73
SANTO SFOGLIANO	1-22-74
ERNEST SLAGUS	8-23-73
WALTER SLUTSKY	7-2 -70
STANLEY STRYJEWSKI	7- 2-70
VINCENT TUMMARELLO	11-29-73
EUGENE VAUGHAN	1- 7-66

14. All of the plaintiffs appointed as aforesaid were assigned to the Manhattan office and presently working at the World Trade Center in the Borough of Manhattan, which is within the territorial jurisdiction of this Court.

## Complaint

15. All of the plaintiffs were required to serve a probationary period of six months. At the expiration of their probationary period, plaintiffs were retained and each became a permanent tenured civil service employee.

16. All of the plaintiffs are annually rated and each received a written performance rating. Annexed herewith and marked Schedule "A" is a copy of an evaluation report.

17. Although plaintiffs are permanent civil service employees occupying positions in the competitive civil service of the State of New York and paid by the Comptroller of the State of New York, defendants have failed and refused to permit plaintiffs to become members of the NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM because of the pension which they are receiving from the Police Department Pension Fund of the City of New York, and have failed and refused to make contributions on behalf of plaintiffs in the retirement system of the State of New York for state employees.

18. Pursuant to the provisions of the New York State Retirement and Social Security Law, each of the plaintiffs as a retired New York City pensioner must obtain a letter or certificate of necessity as spelled out in Section 211 thereof, in order to be eligible for employment and to be continued in said employment.

19. Annexed herewith and marked Schedule "B" is the civil service announcement for the position of Excise Tax Investigator. An Excise Tax Investigator makes arrests; issues



## Complaint

summonses; maintains surveillance of tax evaders; enforces the Cigarette Tax Laws, and are designated Police Officers in the execution of Search Warrants.

20. All of the plaintiffs in the performance of their duties as Excise Tax Investigators are Peace Officers and are required to and do carry firearms.

21. All of the plaintiffs were advised by defendants that they were not eligible to join or become members of the NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM because they were retirees and receiving a pension from the New York City Police Department Pension Fund. Annexed herewith and marked Schedule "C" is a copy of a letter received by plaintiff BRAVY.

22. Since plaintiffs are prohibited from joining and becoming members of the NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM, their beneficiaries are denied death insurance benefits and denied the benefits of accidental death benefits (Section 61), ordinary disability retirement (Section 62), and accidental disability retirement if injured in the line-of-duty (Section 63, Retirement and Social Security Law).

23. Annexed herewith and marked Schedule "D" is a copy of a form prepared by defendants (with the exception of the protest and without waiver) which several of the plaintiffs were required to sign in order to remain in their present position of Excise Tax Investigator.

## Complaint

BASIS FOR ACTION

24. Although the Constitution of the United States mandates and guarantees due process and the equal protection of the laws, and federal statutes and Executive Proclamations prohibit discrimination, the defendant state officials and state agencies in applying and construing the sections of the Retirement and Social Security Laws being challenged herein, are discriminating against plaintiffs and placing them in the category of second rate citizens because of being retired New York City pensioners.

25. Sections 40 (e) 210, 211, 212, 213, 214, 215 and 216 of the New York State Retirement and Social Security Laws do not discriminate against a person who is receiving a pension from the United States Government or from any state or municipality outside the State of New York from being employed as an Excise Tax Investigator with defendant New York State Department of Taxation and Finance. Should such a pensioner become a New York State employee, he would be permitted to join and become a member of the NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM. The said sections, however, do restrict and limit any person who is receiving a pension or annuity "at the expense of the state or of a political subdivision thereof."

## Complaint

26. That plaintiffs because of said statutes and being the recipient of a New York City pension, are being harassed, discriminated against and deprived of equal justice and equal treatment under the law. The said sections are invidious, offensive, obnoxious and unconstitutional. Plaintiffs are being deprived of a property right, the right to earn a living, and a denial of their constitutional right to due process and the equal protection of the laws.

FIRST CAUSE OF ACTION

27. The sections of the New York State Retirement and Social Security Laws which are being challenged herein, and on which defendants are relying to terminate plaintiffs' employment unless they waive their right to their New York City pension which they earned because of many years of service as Police Officers, are unconstitutional and deprives plaintiffs of their money and property without due process of law.

SECOND CAUSE OF ACTION

28. No adequate state justification exists for this arbitrary, invidious and illegal scheme embodied in the sections of the New York State Retirement and Social Security Laws being challenged herein, and hence it is invalid under the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.



## Complaint

THIRD CAUSE OF ACTION

29. By impermissibly denying to plaintiffs their right to retain their pensions - a vested contract right, and by depriving them as tenured competitive civil service employees of a property right which they had in their positions, constitute a denial of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States and contrary to decisional Law.

FOURTH CAUSE OF ACTION

30. The refusal and failure on the part of defendants to permit plaintiffs as New York State employees to join and become members of the New York State Employees' Retirement System and to enjoy and be entitled to all of the rights, benefits and privileges concomitant with membership therein, is in violation of their constitutional rights to due process and the equal protection of the laws, and denies to plaintiffs the opportunity of earning a livelihood, life, liberty and the pursuit of happiness.

FIFTH CAUSE OF ACTION

31. The statutes being challenged herein are intentionally and purposefully discriminating against plaintiffs. The actions of defendants are invidious, made in bad faith and intended to harass plaintiffs by discriminatory tactics, operating to the immediate prejudice, damage and detriment of plaintiffs.

## Complaint

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Honorable Court:

1. Assume jurisdiction of this cause, convene a three-Judge district court pursuant to 28 U.S.C. Sections 2281 and 2284 to determine this controversy and set this case down promptly for a hearing.

2. Pending a hearing and determination by the three-Judge court, to grant a temporary restraining order pursuant to 28 U.S.C. Section 2284 (3) restraining defendants, their successors in office, agents and employees, and all other persons in active concert and participating with them from dismissing plaintiffs from their positions of Excise Tax Investigators with the New York State Department of Taxation and Finance, and from requiring plaintiffs as a condition precedent to continued employment to waive their rights to receive their pensions from the New York City Police Department Pension Fund.

3. Enter a final judgment pursuant to 28 U.S.C. Sections 2201, 2202, and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that Sections 40 (e), 210, 211, 212, 213, 214, 215 and 216 of the New York State Retirement and Social Security Laws are invalid upon the ground that they are violative of the provisions contained in the First and Fourteenth Amendments to the United States Constitution, the Civil Rights Act, and the Laws of the United States.

## Complaint

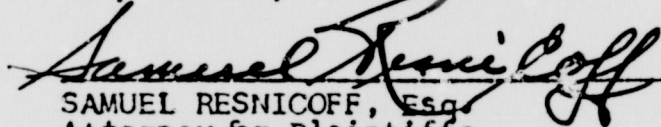
4. Enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents and employees and all other persons in active concert and participation with them from terminating plaintiffs as Excise Tax Investigators in the New York State Department of Taxation and Finance because of their status as retirees and pensioners in the New York City Police Department Pension Fund, and from requiring plaintiffs to execute a waiver of their New York City Police pension in order to retain their present positions of Excise Tax Investigators.

5. To issue a writ of mandamus directing defendants to permit plaintiffs to join and become members of the NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM retroactive to the date they commenced employment as Excise Tax Investigators.

6. To grant plaintiffs damages in such amounts as would adequately compensate them.

7. To grant plaintiffs such additional alternative relief as may seem to this Court to be just, proper and equitable.

Respectfully submitted,



SAMUEL RESNICOFF, Esq.  
Attorney for Plaintiffs  
Office & P. O. Address  
280 Broadway  
New York, N.Y. 10007

Digby 9-3896



# Schedule A, Evaluation Report, Annexed to Foregoing Complaint

AD-307 (12/65)

State of New York - Department of Taxation and Finance  
Personnel Bureau

## EMPLOYEE'S ANNUAL WORK PERFORMANCE RATING

NOTE: Use this form to report a summary rating of Satisfactory only.

Use Civil Service Form PS-103 to report a summary rating of Unsatisfactory.

NAME <b>Leonard Mallon</b>		This rating is for the year ending December 31, 19 <b>73</b>	This rating is for the interim period From: <b>1/1/73</b> To: <b>12/31/73</b>	
BUREAU OR DISTRICT OFFICE <b>Special Investigations Bureau</b>		SECTION <b>Cigarette Tax Unit</b>	TITLE AND GRADE IN WHICH RATED <b>Excise Tax Investigator (13)</b>	
EMPLOYEE'S SERVICE FACTORS			STATUS	
	SATISFACTORY	UNSATISFACTORY	<input checked="" type="checkbox"/> PERMANENT <input type="checkbox"/> PROVISIONAL <input type="checkbox"/> TEMPORARY	
1. Proficiency	<input checked="" type="checkbox"/>	<input type="checkbox"/>	PERMANENT TITLE IF OTHER THAN ABOVE	
2. Attendance	<input checked="" type="checkbox"/>	<input type="checkbox"/>		
3. Attitude	<input checked="" type="checkbox"/>	<input type="checkbox"/>		
To Rated Employee: Your signature on this form indicates only that you have received written notice of your rating, and does not necessarily imply that you agree with the rating.			SUPERVISOR'S SUMMARY RATING Having considered factors including but not limited to those noted on this form, I rate this employee's service as satisfactory.	
			Supervisor's Signature <i>[Signature]</i>	Date <b>1/4/74</b>
			Reviewer's Signature <i>[Signature]</i>	Date <b>1/2/74</b>
			Employee's Signature (on duplicate only)	Date

SCHEDULE "A"

Schedule B, Civil Service Announcement,  
Annexed to Foregoing Complaint



NEW YORK STATE ANNOUNCEMENT  
OPPORTUNITIES IN GOVERNMENT

NO. 20-976

EXCISE TAX INVESTIGATOR

Beginning Salary \$9,215

NEW YORK STATE RESIDENCE NOT REQUIRED.

**LOCATION OF POSITIONS:** This position exists in the Department of Taxation and Finance. The eligible list resulting from this examination will be used to fill vacancies in the New York Metropolitan area ONLY (Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk and Westchester Counties). The above salary includes a \$200 annual salary differential for appointees in this area. Numerous positions are anticipated in New York City.

THE EXAMINATION WILL BE ADMINISTERED ONLY IN THESE TEST CENTERS:

- |             |                 |                |
|-------------|-----------------|----------------|
| • Brentwood | • New York City | • Riverhead    |
| • Mineola   | • Nyack         | • White Plains |
|             | • Peekskill     |                |

**MINIMUM QUALIFICATIONS:** On or before the date of the written test, candidates must have seven years of full-time paid experience in law enforcement or investigative work in a governmental police agency dealing with the investigation of criminal activities.

The following types of experience will NOT be considered qualifying for purposes of this examination: bank guards, private investigators, military police, alcoholic beverage control investigators, unemployment insurance investigators, security guards, and similar type positions.

**DRIVER'S LICENSE:** To be considered for appointment you must have a valid New York State driver's license.

**PHYSICAL, MEDICAL, AND CHARACTER REQUIREMENTS:** Candidates must, at the time of the written test and at the time of appointment, be physically strong and active; free from all mental and physical defects, deformities, or disease; have vision at least 20/40 in each eye with or without corrective lenses and not less than 20/70 in each eye unaided; at least 5 feet 8 inches in height in bare feet, with weight (minimum 145 lbs.) in proportion to height; and have satisfactory hearing.

Candidates must also be of good moral character and habits, and free from any mental or physical defect that would have a tendency to incapacitate. Conviction of a felony will bar, and conviction of a misdemeanor, or other violation of law, or a history of mental illness or nervous disorder may bar examination and appointment. A character investigation will be made.



## Schedule B

Candidates who pass the written test will also be given a qualifying medical test at which time they will be required to demonstrate satisfactory physical strength and coordination. It is expected that the medical examination and investigative screening will be conducted on the same day.

Detailed physical and medical requirements can be obtained by writing to the Medical Review Unit, New York State Department of Civil Service, Albany, New York 12226.

Candidates appointed to this position will be required to serve a probationary period of six months during which time they must successfully complete a firearms training program.

Examination To Be Held OCTOBER 14, 1972  
Applications Accepted Up To AUGUST 28, 1972

S-1-T-4-AWV-elc

SEE REVERSE SIDE

Issued: 7/23/72

New York State - An Equal Opportunity Employer

(Page 1)

SCHEDULE "B"

## Schedule B

## EXCISE TAX INVESTIGATOR

- 2 -

NO. 20-976

**SUBJECT OF EXAMINATION:** Written test designed to test for knowledge, skills, and/or abilities in such areas as principles and techniques of investigation; preparing written reports; understanding and interpreting written material; and analyzing and evaluating information and evidence.

**DUTIES:** An Excise Tax Investigator, under supervision of a Senior Excise Tax Investigator, conducts investigations relative to violations of the Cigarette Tax Law. He maintains surveillance of suspected or known tax evaders; gathers information on alleged cigarette smugglers from informants, police officials and vendors; watches the approach to New York State to identify vehicles suspected of carrying contraband cigarettes from low-tax and non-tax areas; seizes and confiscates cigarettes and apprehends violators; makes arrests and issues summonses; inspects meter impressions on cigarette packages to detect counterfeiting of impressions, and tests impressions; investigates alleged locations of counterfeiting operations and confiscates counterfeiting devices and arranges the arrest of violators; prepares reports; gathers evidence for prosecution and testifies in court.

S-1-T-4-AWV-etc

Issued: 7/28/72

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 INFORMATION FOR CANDIDATES

**APPLICATION FORMS:** You may obtain these forms by mail or in person at the following offices of the State Department of Civil Service: State Office Building Campus, Albany, New York 12226, or 1350 Avenue of the Americas, at 55th Street, New York, New York 10019, or Suite 750, 1 West Genesee Street, Buffalo, New York 14202. Applications may also be obtained by calling in person at one of the local offices of the New York State Employment Service; these offices cannot handle mail requests. Specify the examination by its number and title. Mail your application form when completed to the State Department of Civil Service, State Office Building Campus, Albany, New York 12226. The Department of Civil Service reserves the right to reject for lateness or to accept applications filed after the advertised filing period.

XD-17.1 (7-71)

**ADMISSION TO EXAMINATION:** Notice to appear for the test will be conditional as review of applications may not be made until after the first test. Call or wire this Department if you have not received your notice to appear 3 days before the date of the first test. All statements made on your application are subject to investigation and a medical examination may be required. Applicants whose religious beliefs prevent their taking examinations before sundown and physically handicapped candidates who require special examination facilities, should so inform the Examinations Division, Arrangements Unit, by a separately mailed letter at the earliest possible date before the first test.

*This announcement is being issued and the examination will be held in compliance with the New York State Civil Service Law and the Rules and Regulations of the New York State Department of Civil Service.*

*(Page 2)*

Schedule C, Letter Received by Bravy,  
Annexed to Foregoing Complaint



STATE OF NEW YORK  
DEPARTMENT OF  
TAXATION AND FINANCE  
ALBANY

DANIEL F. HALLORAN  
DIRECTOR OF PERSONNEL

March 3, 1975

Mr. George T. Bravy  
Matthews Drive - P.O. Box 50  
Speonk, New York 11972

Dear Mr. Bravy:

In reply to your recent inquiry, the Law pertaining to the New York State Employees' Retirement System, Section 40E, states:

"Any person who is or may be entitled to benefits by any other law providing for pensions and annuities for civil service employees, wholly or partly at the expense of the state or of a political subdivision thereof, shall not be a member."

As you see, this clause prohibits your enrollment in the retirement system.

Very truly yours,

A handwritten signature in cursive script, reading "Daniel F. Halloran".

DANIEL F. HALLORAN  
Director of Personnel



Schedule D, Form Prepared by Defendant  
Annexed to Foregoing Complaint.

DEPARTMENT OF TAXATION AND FINANCE

MEMORANDUM

TO : John F. Grogan OFFICE: Personnel  
FROM : Daniel F. Halloran DATE : February 4, 1975  
SUBJECT: Employment Under Section 211  
of the New York State Retirement  
and Social Security Law

The Civil Service Commission has extended approval for you to continue as an Excise Tax Investigator through March 19, 1975. If you wish to continue in the employment of New York State after that date, you will not be eligible to receive your pension from New York City.

Please advise whether you will waive your New York City pension and continue as an Excise Tax Investigator with the Tax Department by signing one of the statements below and returning a copy of this letter.

*Daniel F. Halloran*  
DANIEL F. HALLORAN  
Director of Personnel

TO CONTINUE AS AN EXCISE TAX INVESTIGATOR

I wish to continue in the employment of New York State as an Excise Tax Investigator after March 19, 1975. I understand that by doing this I will not receive my New York City pension. This is under protest and without waiver of my rights to a Court action challenging this procedure.  
Date 2/19/75 Signature John F. Grogan

TO RESIGN FROM YOUR NEW YORK STATE POSITION

I wish to continue to receive my New York City pension after March 19, 1975. Therefore, I resign from my position as an Excise Tax Investigator effective close of business March 19, 1975.

Date \_\_\_\_\_ Signature \_\_\_\_\_

Answer

UNITED STATES DISTRICT COURT  
For The  
~~Northern~~ DISTRICT OF NEW YORK

---

GEORGE T. BRAVY, et al.,

Plaintiffs,

- against -

ANSWER

JAMES H. TULLY, JR., Commissioner,  
New York State Department of Taxation  
and Finance; NEW YORK STATE EMPLOYEES'  
RETIREMENT SYSTEM; NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE,  
and ARTHUR LEVITT, Comptroller, State of  
New York,

Defendants.

---

Defendants, answering the complaint herein by their attorney,  
Louis J. Lefkowitz, Attorney General of the State of New York:

FIRST: Admit, upon information and belief, the allegations  
set forth in the paragraphs of the complaint numbered "1", "2",  
"3", "10", "11", "13", "14", "15", "16", "19", "20" and "25".

SECOND: Deny the allegations set forth in paragraphs "4", "17"  
and "21", except insofar as defendants are bound by New York State  
Retirement and Social Security Law, §§ 40 and 211.

THIRD: Deny knowledge or information sufficient to form a  
belief as to the allegations set forth in paragraph "5" except  
refer the Court to the provisions of New York State Civil Service  
Law § 150 and Retirement and Social Security Law §§ 40 and 211,  
and New York City Charter § 1117.

FOURTH: Admit that paragraphs "6", "7" and "8" fairly state  
the jurisdictional basis of the action and the grounds on which

## Answer

plaintiffs seek relief.

FIFTH: Deny each and every allegation set forth in the paragraphs of the complaint numbered "9", "24", "26" and "27" through "31" inclusive.

SIXTH: Deny the allegations set forth in paragraph "12" except admit that in accordance with the provisions of Retirement and Social Security Law § 211, plaintiffs could not be approved for employment thereunder unless it be shown that there is need for such services (section 211, subd. 2, par. b(2)), which need would not exist when there were other candidates eligible for appointment.

SEVENTH: Deny the allegations set forth in paragraphs "18" and "23" and refer the Court to the provisions of Retirement and Social Security Law § 211 for a complete and accurate statement of its terms.

EIGHTH: Deny the allegations set forth in paragraph "22" and refer the Court to the provisions of Retirement and Social Security Law § 40, subd. c, par. 9.

AS AND FOR SEPARATE DEFENSES  
AND OBJECTIONS, DEFENDANTS ALLEGE:

NINTH: The complaint fails to state a claim of unconstitutionality against the particular statutes of the State of New York upon which the relief requested in the complaint can be granted.

TENTH: The complaint fails to join a necessary party defendant therein, to wit, the New York City Employees' Retirement System.



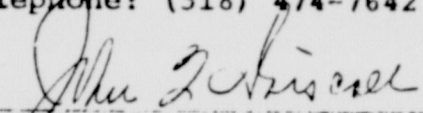
28a

Answer

WHEREFORE, the defendants demand judgment dismissing the complaint and denying the various provisional remedies requested therein.

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendants  
Office and P.O. Address  
The Capitol  
Albany, New York 12224  
Telephone: (518) 474-7642

by

  
JOHN Q. DRISCOLL  
Assistant Attorney General

Notice of Motion for an Order  
Convening a Three-Judge District Court

UNITED STATES DISTRICT COURT  
for the  
NORTHERN DISTRICT OF NEW YORK

-----  
GEORGE T. BRAVY, et al.,

Plaintiffs,

- against -

75 Civ. 270

JAMES H. TULLY, Jr., Commissioner,  
New York State Department of Taxation  
and Finance, etc., et al.,

Defendants.  
-----

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of JOHN F. GROGAN, duly sworn to the 8th day of September, 1975, the summons, complaint and answer filed herein, and upon all of the prior papers and proceedings, the undersigned will move this Court at the United States Courthouse, Courtroom #1, United States Post Office, Broadway, in the City of Albany, State of New York, on the 6th day of October, 1975, at 10:00 a. m. in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order convening a Three-Judge District Court, pursuant to Title 28, U.S.C., Sections 2281 and 2284, to declare Sections 40 (e), 210, 211, 212, 213, 214, 215 and 216 of the New York State Retirement and Social Security Law unconstitutional, and for such other, further and

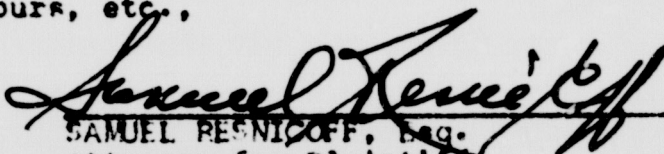


Notice of Motion for an Order  
Convening a Three-Judge District Court

different relief as to the Court may seem just and proper in the premises.

DATED: New York, September 8, 1975.

Yours, etc.,



SAMUEL RESNICOFF, Esq.  
Attorney for Plaintiffs  
Office & P. O. Address  
280 Broadway  
New York, N.Y. 10007

TO:

Hon. LOUIS J. LEFKOWITZ, Esq.  
Attorney General, State of New York  
Office & P. O. Address  
Capitol, Albany, New York

Affidavit of John F. Grogan  
In Support of Motion

UNITED STATES DISTRICT COURT  
for the  
NORTHERN DISTRICT OF NEW YORK

-----  
GEORGE T. BRAVY, et al.,

Plaintiffs,

- against -

JAMES H. TULLY, Jr., Commissioner,  
New York State Department of Taxation  
and Finance, et al.,

Defendants.  
-----

STATE OF NEW YORK )  
CITY OF NEW YORK ) ss.:  
COUNTY OF NEW YORK )

JOHN F. GROGAN, being duly sworn, deposes and says:

1. I am one of the plaintiffs in the above-entitled action and submit this affidavit in support of our application for an order to convene a Three-Judge District Court to declare Sections 40 (e), 210, 211, 212, 213, 214, 215 and 216 of the New York State Retirement and Social Security Law unconstitutional.

2. This action was instituted on April 11, 1975 in the United States District Court for the Southern District of New York. At an informal hearing before United States District Judge HENRY F. WERKER on April 30, 1975, Judge WERKER by order transferred the action to this Court. Defendants were given sixty days within which to interpose an answer. Issue was joined by the service of an answer on July 2, 1975.

3. All of the plaintiffs are honorably discharged veterans and retired Police officers having served in the Police

## Affidavit of John F. Grogan

Department of the City of New York. In the interest of expediency and to avoid duplication, we respectfully refer the Court to the factual allegations appearing in our complaint.

4. Having retired from the Police Department each of the plaintiffs received his pension allowance. Thereafter, each of the plaintiffs filed an application with the New York State Civil Service Commission to compete in an open competitive written examination for the position of Excise Tax Investigator, New York State Department of Taxation and Finance. In view of our background and experience as Law Enforcement Officers, we were all marked eligible to compete in the written examination for said position. Each of the plaintiffs passed the examination and although some of us attained higher marks on the examination than other competing candidates who were not retired Police Officers of the Police Department of the City of New York, we were last to receive offers of appointment.

5. All of the plaintiffs were required to serve a probationary period of six months. We were retained at the expiration of our probationary periods and became tenured competitive civil service employees. Nevertheless, we are not permitted to become members of the New York State Employees' Retirement System. As Excise Tax Investigators, we are Law Enforcement Officers. We carry firearms and make arrests. We search vehicles carrying contraband cigarettes into the State of New York. We execute Search Warrants. As Peace Officers, we are engaged in hazardous



Affidavit John F. Grogan

work. However, since we are not permitted to join and become a member of the New York State Employees' Retirement System, our families in the event of our death in the performance of our duties, will not be permitted to claim death insurance benefits or accidental death benefits. Additionally, if we are assaulted, maimed or seriously injured in the line of duty, we would be unable to make a claim for ordinary disability retirement or accidental disability retirement.

6. In addition, several of the plaintiffs have been required in writing to waive their police pension checks to retain their present positions (Schedule "D" annexed to complaint). By denying us our right to receive and to retain our pension allowances, defendants have deprived us of a property right without due process of law. Our pension payments are not a gratuity.

7. A retired United States government employee or a retired pensioner from any State or municipality outside the State of New York, is permitted to join and become a member of the New York State Employees' Retirement System. We, however, as former New York City employees are barred under the New York State Retirement and Social Security Law. The statutes are patently discriminatory, invidious and constitutionally offensive. Retirement in a pension system is a contractual relationship, the benefits of which may not be impaired, diminished or defeated by any statute or State agency.

## Affidavit of John F. Grogan

8. We are advised by our attorney and verily believe to be true that the complaint herein should be heard by a Three-Judge District Court (FRASIER v. BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, 134 F. Supp. 589, aff'd 350 U.S. 979; McMILLAN v. THE BOARD OF EDUCATION, 430 F. 2d 1145; McL DOUGALL v. SUGARMAN, 339 F. Supp. 906; TURLEY v. LEFKOWITZ, 342 F. Supp. 544; ROYSTER v. MCGINNIS, 327 F. Supp. 1318; ROMANO v. KIRMAN, 391 F. Supp. 643; STEPHENS v. YOEKANS, 327 F. Supp. 1182; SERO v. OSWALD, 355 F. Supp. 1231; LOPEZ v. WYMAN, 329 F. Supp. 483; ROE v. INGRAM, 480 F. 2d 102; CARTER v. GALLAGHER, 337 F. Supp. 626, and STEVENS v. CAMPBELL, 332 F. Supp. 102). The sections of the State law being challenged herein operate to our immediate prejudice, damage and detriment and deny to all of the plaintiffs due process of law and violate the equal protection clause of the Constitution.

WHEREFORE, it is respectfully requested that an Order be issued convening a Three-Judge District Court to declare the challenged sections of the New York State Retirement and Social Security Law unconstitutional.

Sworn to before me this  
8th day of September 1975.

/s/ JOHN F. GROGAN

NOTARY PUBLIC  
No. 24-742  
Canton  
Comm. 1976

STATE OF NEW YORK  
in Kings Co.  
County  
1976 76

Notice of Motion to Dismiss the Complaint

UNITED STATES DISTRICT COURT  
for the  
NORTHERN DISTRICT OF NEW YORK

---

GEORGE T. BRAVY, et al.,

Plaintiffs,

NOTICE OF MOTION

-against-

75 Civ. 270

JAMES H. TULLY, JR., Commissioner,  
New York State Department of Taxation  
and Finance, etc., et al.,

Defendants.

---

S I R:

PLEASE TAKE NOTICE that upon the summons, complaint and answer filed herein, and upon all of the prior papers and proceedings, the undersigned will move this Court at the United States Courthouse, Courtroom No. 1, United States Post Office in the City of Albany, State of New York, on the 6th day of October, 1975 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for judgment dismissing the complaint on the pleadings, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for failure to state



Notice of Motion

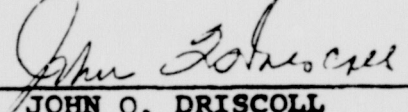
a claim upon which relief can be granted, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Albany, New York  
September 29, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendants  
Office & P.O. Address  
The Capitol  
Albany, New York 12224

By

  
JOHN Q. DRISCOLL

TO: SAMUEL RESNICOFF, ESQ.  
Attorney for Plaintiffs  
280 Broadway  
New York, New York 10007

Notice of Motion to Dismiss Complaint,  
Dated October 1, 1975.

UNITED STATES DISTRICT COURT  
for the  
NORTHERN DISTRICT OF NEW YORK

---

GEORGE T. BRAVY, et al.,

Plaintiffs,

-against-

JAMES H. TULLY, JR., Commissioner,  
New York State Department of Taxation  
and Finance, etc., et al.,

Defendants.

---

NOTICE OF MOTION

75 Civ. 270

S I R:

PLEASE TAKE NOTICE that upon the summons, complaint and answer filed herein, and upon all of the prior papers and proceedings, the undersigned will move this Court at the United States Courthouse, Courtroom No. 1, United States Post Office in the City of Albany, State of New York, on the 20th day of October, 1975 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for judgment dismissing the complaint on the pleadings, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted, and for such other

Notice of Motion to Dismiss Complaint,  
Dated October 1, 1975.

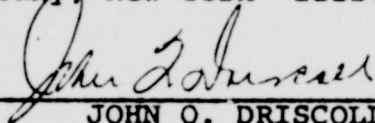
and further relief as to the Court may seem just and proper in  
the premises.

Dated: Albany, New York  
October 1, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendants  
Office & P.O. Address  
The Capitol  
Albany, New York 12224

By

  
JOHN Q. DRISCOLL

TO: SAMUEL RESNICOFF, ESQ.  
Attorney for Plaintiffs  
280 Broadway  
New York, New York 10007



Memorandum-Decision and Order  
Appealed From.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND BENOIT,  
BERNARD BERKOWITZ, JOHN BLANDEBURGO, DAVID  
CAMPBELL, OTTAVIO FAZIO, HARRY FINNIGAN, ROBERT  
GORDON, JOHN GROGAN, JOSEPH HIGGINS, KENNETH  
KRAUS, JOSEPH LAMENDOLA, LOUIS LINHART, THOMAS  
LONGOBARDI, LEONARD MALLON, FRANCIS MCCALL,  
DANIEL MCCARTHY, WILLIAM MCCARTHY, FREDERICK  
MOONEY, GEORGE NORTON, JOHN J. O'BRIEN, GEORGE  
ODONITS, VINCENT SALAMONE, DOMINICK SANSOSTI,  
SANTO SFOGLIANO, ERNEST SLAGUS, WALTER SLUTSKY,  
STANLEY STRYJEWSKI, VINCENT TUMMARELLO and  
EUGENE VAUGHAN,

75-CV-270

Plaintiffs,

-against-

JAMES H. TULLY, Commissioner, New York  
State Department of Taxation and Finance; NEW  
YORK STATE EMPLOYEES' RETIREMENT SYSTEM; NEW  
YORK STATE DEPARTMENT OF TAXATION AND FINANCE,  
and ARTHUR LEVITT, Comptroller, State of  
New York,

Defendants.

APPEARANCES:

OF COUNSEL:

Samuel Resnicoff  
Attorney for Plaintiffs  
280 Broadway  
New York, New York 10007

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendants  
Capitol  
Albany, New York 12224

JOHN Q. DRISCOLL  
Assistant Attorney General

W. BERNARD RICHLAND  
Corporation Counsel of the  
City of New York  
Attorney, Amicus Curiae  
Municipal Building  
New York, New York 10007

ROBERT I. KURTZ  
IRVING GENN  
BERNARD FRIEDLANDER

JAMES T. FOLEY, D.J.

## Memorandum.

## MEMORANDUM-DECISION and ORDER

Thirty-one Excise Tax Investigators of the New York State Department of Taxation and Finance commenced this action in the United States District Court for the Southern District of New York, pursuant to 42 U.S.C. §§ 1981 and 1983 and 28 U.S.C. §§ 1331, 1361, 1391, 1343(3)(4), seeking to have enjoined and declared unconstitutional under 28 U.S.C. §§ 2201, 2202, certain New York State Statutes, specifically, Sections 40(e), and Article 7, [§§ 211 through 216] of the New York State Retirement and Social Security Law as well as to obtain money damages for alleged injuries these laws have caused them. This case, after its filing and service of process in the Southern District of New York, was transferred to this Northern District of New York, after informal hearing with District Judge Henry F. Werker, which resulted in a stipulation of the attorney for the plaintiffs and an Assistant Attorney General for Attorney General Louis J. Lefkowitz, Attorney for the defendants, with the endorsement thereon of Judge Werker on May 1, 1975, transferring the action to this District Court.

✓ All the plaintiffs were policemen of the City of New York, stationed in Manhattan at the World Trade Center, and are now retired from that employment. At the present time they are employed as New York State Excise Tax Investigators in and around the New York City area. The plaintiffs, according to the complaint and submissions herein, are retired from the New York City police force with the requisite years that entitled them to receive, as they are presently, a pension from New York City. After their respective



## Memorandum.

retireme~~nts~~ all the plaintiffs took a civil service examination and met other legal requirements to be appointed to their present jobs as State Excise Tax Investigators. Both in the complaint, and by motion heard on October 6, 1975, plaintiffs request the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284. The defendants filed a motion to dismiss the complaint on the ple~~as~~ pursuant to Fed. R. Civ. P. 12(c) on October 3, 1975, made returnable October 20, 1975. For the convenience of the parties, however, both of these motions were argued in advance and heard by the Court at the October 6, 1975, motion day in Albany. Since defendants had not filed their answer in this action until October 22, 1975, the pleadings were not complete at the time of their single motion to dismiss the complaint on the pleadings, so this motion will be considered as one pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. 5 Wright & Miller, Fed. Prac. & Pro. Civil: §§ 1355-57 and 1367-69. Lastly, by Stipulation and Agreement, it was ordered by me on October 23, 1975, that the New York City Corporation Counsel be allowed to appear amicus curiae since issues relating to the New York City Police Pension Fund were present, and an amicus curiae brief has been filed by that office in support of the motion to dismiss the complaint.

The challenges made to the New York State Retirement and Social Security Law, with the exception of § 216 which has no discernible relevance to the claims made here, are basically twofold. First, under Sections 211 to 215 and 40(e) of the N.Y. Retirement and Social Security Law, a person who is retired from public employ-



## Memorandum.

ment with the State of New York or any political subdivision thereof may not become a member of or receive credit toward any other state or other political subdivision retirement system [§ 213], including the "New York State Employees' Retirement System" [§ 10 et seq. and 40(e)] and are thereby also excluded from any Accidental Disability Retirement under this system [§ 63].

Secondly, a retired public employee of the state or any of its political subdivisions who becomes reemployed by the state or any of its political subdivisions, with exceptions not relevant here, and earns an amount greater than that fixed by various formulae of these statutes [it is implicit that all of the plaintiffs here have "excesses" over the excepted minimum] shall have his retirement allowance and supplemental retirement payments suspended "until the total amount so suspended equals the amount of such excess." N.Y. Retirement and Social Security Law, Section 211 (3). Thus; the plaintiffs have been requested by the State of New York pursuant to their employment as Excise Tax Investigators under § 211 to waive the New York City Pensions which they are presently receiving. Several plaintiffs did sign such waivers indicating thereon that their consent was under protest and without waiver of the right to court action challenging this waiver. See Complaint Schedule "D"; Affidavit of John Grogan, ¶6 (filed Sept. 24, 1975). At this juncture it is particularly worthy of note that Section 1117 of the New York City Charter provides that the taxpayer portion of any city pension will be suspended and the payments forfeited for the time the retired city employee shall hold and receive compensation in excess of \$1,800.00 while employed by the State, the City, or another

## Memorandum.

municipality of the State. The retiree shall continue to receive the annuity portion of his retirement allowance. Amicus Curiae, Memo of Law, p. 3. It is essentially on this section that the City of New York intervenes as amicus curiae, yet curiously plaintiffs strongly disavow that Section 1117 has anything to do with this lawsuit and expressly state that the Charter Section is not being challenged herein. See Plaintiffs' Memo. of Law, Point II at p. 3. (Received Oct. 14, 1975). In a similarly curious vein, the State of New York claims that this controversy is controlled by Section 150 of the New York Civil Service Law, which also provides for the suspension and forfeiture of a pension from the state or any political subdivision should the retiree be reemployed by the state or a political subdivision. However, Section 150 of the New York Civil Service Law seems to be of little relevance here because it expressly defers to the provisions of Sections 211 and 212 of the New York Retirement and Social Security Law as preeminently controlling. Plaintiffs, although attacking a substantial number of state statutes, do not challenge the constitutionality of Section 150 of the New York Civil Service Law. In their view, it was expressly stated by defendants that the request to waive New York City pension benefits was made pursuant to Section 211 of the New York Retirement and Social Security Law. See Complaint Schedule "D"; See Plaintiffs' Memo of Law, p. 4 (received October 14, 1975). While the effects, adverse from plaintiffs' point of view, of these statutes are evident in conditioning their present employment on waiving their city pensions, it should equally be noted that it is by virtue of the certification procedure of Section 211(2) of the New York Retire-



## Memorandum.

ment and Social Security Law that they were able to be considered and eventually obtain their current jobs.

The two motions presently before the Court, by the plaintiffs for a three-judge court and by the defendants to dismiss the complaint, are often, in my judgment, two sides of the same coin. Both motions raise the question whether the complaint, when its factual allegations are taken as true as they must be, raises a substantial federal question to sustain the alleged jurisdiction. With slight semantical differences, both the motion to dismiss and the motion for a three-judge court entail a similar search for a threshold level of substantiality in the claim articulated or any which can reasonably be inferred from the complaint, to wit: this claim must surpass the level of being "essentially fictitious", "wholly insubstantial" or "obviously frivolous or without merit," in the language of the leading precedent, *Goosby v. Osser*, 409 U.S. 512 (1973). See *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100 (1974).

✓ Difficult questions of application are presented by these standards for all levels of federal courts. Adding to the inherent difficulty in utilizing this judicially created search for minimal substantiality -- an extremely broad standard -- federal courts have been cautioned to apply it in a restrictive fashion. *Gonzalez v. Automatic Employees Credit Union*, supra, 419 U.S. at 97-98; *Nieves v. Oswald*, 477 F.2d 1109, 1115 (2d Cir. 1973). Thus, the three-judge court procedure has been described as a "plague" to all three levels of the federal judicial system [see *Galvan v. Levine*, 490 F.2d 1255, 1258-59 (2d Cir. 1973)] because it creates "many problems 'so complex as to be virtually beyond belief.'"



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Nieves v. Oswald, supra, 477 F.2d at 1110. However, in all the mist in the many judicial writings on the subject, there is provided an objective standard of some certainty to evaluate the level of substantiality of the claims presented for three-judge composition:

A three-judge court must be convened unless the claim is "wholly insubstantial," "obviously without merit," or if "its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject."

Finnerty v. Cowen, 508 F.2d 979, 985 (2d Cir. 1974); see Goosby v. Osser, supra, 409 U.S. at 518-522.

Perhaps a much simpler and interesting test for jurisdiction might be the formula suggested by Mr. Justice Rehnquist, to wit: [where] "it appears sufficient for jurisdiction that a plaintiff is able to plead his claim with a straight face." See Hagans v. Lavine, 415 U.S. 528, 564 (1974) (Rehnquist, J. dissenting).

Fortunately, there is much less uncertainty and vagueness in that portion of the standard which allows a previous decision of the Supreme Court or Court of Appeals, Second Circuit, to foreclose the subject. Nieves v. Oswald, 477 F.2d at 1112, supra. And, while it is doubtful that decisions by the highest state tribunal could provide such precedent on the federal substantiality issue, they nonetheless must be regarded as authoritative on any related questions of state law involved in the federal constitutional challenge. Higginsbotham v. City of Baton Rouge, La., 306 U.S. 535, 538-39 (1939); Perry v. St. Pierre, 518 F.2d 184, 186 (2d Cir. 1975); Agur v. Wilson, 498 F.2d 961, 965 (2d Cir. 1974), cert. denied, 419 U.S. 1072 (1974); 227 Book Center, Inc. v. Codd, 381 F. Supp. 1111, 1115-16 n.11 (S.D.N.Y. 1974).

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Independent research on the issues and supporting arguments presented by the instant complaint has uncovered considerable precedent which to my mind leaves no doubt as to the lack of federal merit and substance in the challenges made by the plaintiffs herein to the various statutes. On the basis of these previous decisions and their implicit foreclosure of the merits of the instant action, the motion for a three-judge court is denied, and it follows that the complaint must also be dismissed for failure to state a claim upon which relief can be granted.

In a line of unbroken decisions, the United States Supreme Court has made it clear that government pensions granted by statute and not incorporated into a collective bargaining or insurance contract, including those to which an employee contributes, are not vested property rights and they may constitutionally be given, withheld, distributed, reduced, modified and otherwise conditioned as the government, in its lawful discretion, sees fit. *Lynch v. United States*, 292 U.S. 571 (1934); *Frisbie v. United States*, 157 U.S. 160, 39 L.Ed. 657 (1895); *Pennie v. Reis*, 132 U.S. 464; 33 L.Ed. 426 (1889); *United States ex rel. Burnett v. Teller*, 107 U.S. 64, 27 L.Ed. 352 (1883); *United States v. Hall*, 98 U.S. 343, 25 L.Ed. 180 (1879); *Walton v. Cotton*, 60 U.S. (19 How.) 355, 15 L.Ed. 658 (1857); see also *Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir. 1972), cert. denied, 409 U.S. 949 (1972); *Nordstrom v. United States*, 342 F.2d 55 (Ct. Cl. 1965); *Stouper v. Jones*, 284 F.2d 240 (D.C. Cir. 1960); *Rafferty v. United States*, 210 F.2d 934 (3rd Cir. 1954); *Abbott v. Morgenthau*, 93 F.2d 242 (D.C. Cir. 1937), cert. denied, 303 U.S. 638 (1938); *In Re Goodwin*, 57 F.2d 31 (6th Cir. 1932); *In Re Hoag*, 227 F. 478 (S.D.N.Y. 1915).

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In evaluating the specific claims being made by plaintiffs here, I find that the challenged statutes are under these settled principles neither unconstitutional nor unreasonable. In terms of plaintiffs' first claim, it is unequivocally appropriate under the Constitution for the State of New York, on behalf of itself and its political subdivisions, to refuse retired public employees, who already receive one pension, from entering into yet another public retirement system, namely, the New York State Public Employees' Retirement system. This proscription against New York public employees acquiring double pensions has been the policy in the law of both federal and state jurisdictions long before the plaintiffs commenced their employment as New York City policemen. Indeed, in *United States ex rel. Burnett v. Teller*, supra, the Supreme Court approved the removal of one of the double pensions after it had been awarded to the relator:

The right of the relator to double pensions, if he ever had such right, has been effectually cut off . . .

It was competent for Congress to pass this Act. No pensioner has a vested legal right to his pension.

Id., 107 U.S. at 67; 27 L.Ed. at 354.

A similar holding was made by the Court of Appeals for the District of Columbia in *Abbott v. Morgenthau*, supra, which approved congressional disallowance of dual gratuities:

Congress said he could not enjoy both gratuities. It must be borne in mind that Felley had no vested interest or rights in the pension money. . . . Congress could annex whatever conditions it pleased to the gratuity . . .

Id., 93 F.2d at 245.



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In my judgment, the claim of plaintiffs to a denial of property without due process for the statutory refusal under the New York Retirement and Social Security Law §40(e) and §213 to allow entry into a second public retirement system under this clear judicial reasoning and conclusion states an insubstantial federal claim foreclosed by previous decisions of the Supreme Court.

The remaining claim made by plaintiffs is that their acceptance of their new jobs as State Tax Investigators cannot be pre-conditioned on the waiver of their New York City pensions pursuant to Article 7 of the New York Retirement and Social Security Law because they were previously acquired independent to their present state employment. This claim is grounded on the legal theory that their New York City pensions are vested rights due to the contributions made by plaintiffs to the pension fund. This contention needs little discussion because it was also the subject of a decision by the Supreme Court which held no right of property was created or vested to the pensioner for this reason. *Pennie v. Reis*, supra; see also *Stouper v. Jones*, supra, 284 F.2d at 242-43; *Rafferty v. United States*, supra, 210 F.2d at 937; *In Re Goodwin*, supra, 57 F.2d at 32.

Under the cases cited supra, the states have the same general powers and discretions to condition pensions as does Congress. *United States v. Hall*, supra, 98 U.S. at 350, 25 L.Ed. at 182. In addition, the courts of New York have reviewed the generic challenges made by the plaintiffs here, both under the Constitution of the United States and New York State, and have similarly rejected these claims as meritless. *Jones v. Valentine*, 164 Misc. 443 (Sup.

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Ct. Queens Co. 1937), aff'd 276 N.Y. 585 (1937); accord, Cox v. McElligott, 163 Misc. 619 (Sup. Ct. N.Y.Co.1937), aff'd 276 N.Y. 604 (1937); see also Matter of Fay v. O'Brien, 195 Misc. 865 (Sup. Ct. Queens Co. 1949), aff'd 300 N.Y. 756 (1950); Matter of Goodell v. Walsh, 185 Misc. 897 (Sup. Ct. N.Y. Co. 1945); Matter of Bachow v. Kowal, 39 Misc. 2d 439 (Sup. Ct. Erie Co. 1963).

Although these decisions of the courts of New York would have no direct bearing on the substantiality of the federal claim, they are controlling on the proper characterization of these pensions as non-vested rights. Board of Regents v. Roth, 408 U.S. 564, 577 (1974); see Koscherak v. Schmeller, 363 F. Supp. 932 (S.D.N.Y. 1973) (three-judge court), aff'd 415 U.S. 943 (1974). Plaintiffs cannot claim that these rights are vested de jure in light of these expressions of the courts of this state and they make no claims that the pensions were vested by any de facto agreement; indeed, this pension policy disallowing a double pension has been the law at least since 1940 in the State of New York, and has roots back to 1901 in New York City when it was former Section 1560 of the City Charter.

There is no claim being made to requirements for any hearing procedures. See Goldberg v. Kelly, 397 U.S. 254, 263 n.8 (1970); Richardson v. Belcher, 404 U.S. 78, 80-81 (1971); Rodulfa v. United States, supra, 461 F.2d at 1257-58.

The policy of forbidding public employees a double pension, with limited exceptions, is one of long standing in federal employment [see 5 U.S.C. § 8344], in state employment [New York Civil Service Law § 150; Retirement and Social Security Law § 40(e) and

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§§ 210-216], and in city employment [New York City Charter § 1117]. The policy it seems to me has been repeatedly reaffirmed and upheld as constitutional in the United States Supreme Court as well as the courts of New York State. There is no doubt, in my judgment, that the challenges made here by plaintiffs to the constitutionality of such a policy have been held devoid of merit previously, and must be considered so now.

One additional observation must be made on the alleged jurisdiction against the New York State Department of Taxation and Finance and the New York State Employees' Retirement System. While no objection is presented by the parties and although this decision dismisses the complaint against all defendants, it is, in any event, necessary to note that the New York State Department of Taxation and Finance is not a "person" subject to federal jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974). It is also highly questionable at this stage whether either of these defendants are amenable to suit for money damages in light of the Eleventh Amendment of the United States Constitution. See *Fitzpatrick v. Bitzer*, 519 F.2d 559 (2d Cir. 1975).

In conclusion, the motion of plaintiffs for a three-judge court is hereby denied and the motion of the defendants is granted dismissing the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Despite the realization that lessened income in these troubled days causes hardship,



51a

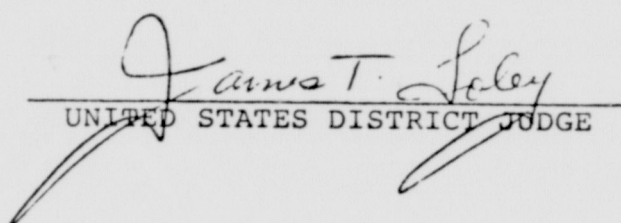
Memorandum.

it is my judgment the claims made here lack sufficient merit under previous decisions of the United States Supreme Court.

It is so Ordered.

Dated: November 13, 1975

Albany, New York

  
UNITED STATES DISTRICT JUDGE

## Notice of Appeal.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----

GEORGE T. BRAVY, JOSEPH ANZALONE,  
RAYMOND BENOIT, et al.,

Plaintiffs,

- against -

JAMES H. TULLY, JR., Commissioner, New  
York State Department of Taxation and Finance;  
NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM,  
et al., etc.,

75 Civ. 270

Defendants.

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S I R :

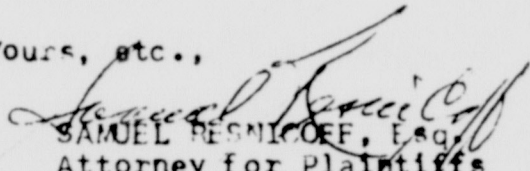
PLEASE TAKE NOTICE that the plaintiffs hereby appeal to the United States Court of Appeals for the Second Circuit, from the Order and Judgment entered herein on the 14th day of November, 1975, in the Office of the Clerk of the United States District Court for the Northern District of New York, which denied plaintiff's motion for a three-Judge Court, and granted judgment to defendants and dismissed the complaint, and plaintiffs appeal from each and

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every part of said Order and Judgment, as well as from the whole thereof.

DATED: New York, December 8, 1975.

Yours, etc.,

  
SAMUEL RESNICOFF, Esq.  
Attorney for Plaintiffs  
Office & P. O. Address  
280 Broadway  
New York, N.Y. 10007

TO:-

Digby 9-3896

Hon. LOUIS J. IEFKOWITZ  
Attorney General, State of New York  
Attorney for Defendants  
The Capitol  
ALBANY, N.Y. 12224



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND BENOIT,  
BERNARD BERKOWITZ, JOHN BLANDE-BURGO, DAVID CAMPBELL,  
OTTAVIO FAZIO, HARRY FINNEGEN, ROBERT GORDON, JOHN GROGAN,  
JOSEPH HIGGINS, KENNETH RAUS, JOSEPH LAMENDOLA, LOUIS  
LINHART, THOMAS LONGOBARDI, LEONARD MALLON, FRANCIS  
McCALL, DANIEL McCARTHY, WILLIAM McCARTHY, FREDERICK  
MOONEY, GEORGE NORTON, JOHN J. O'BRIEN, GEORGE ODonITS,  
VINCENT SALAMONE, DOMINICK SANSOSTI, SANTO SFOGLIANO,  
ERNEST SLAGUS, WALTER SLUTSKY, STANLEY STRYJEWSKI, VINCENT  
TUMMARELLO and EUGENE VAUGHAN,

Plaintiffs-Appellants,

against

JAMES H. TULLY, Jr., Commissioner, New York State Department  
of Taxation and Finance; NEW YORK STATE EMPLOYEES'  
RETIREMENT SYSTEM: NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, and ARTHUR LEVITT, COMPTROLLER, State of  
New York,

Defendants-Appellees.

AFFIDAVIT  
OF SERVICE  
BY MAIL

STATE OF NEW YORK,  
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that he  
is over the age of 18 years, is not a party to the action, and resides  
at 951 East 17th Street, Brooklyn, New York, 11230.  
That on January 7, 1976, she served 3 copies of Appendix  
on

HON. LOUIS J. LEFKOWITZ,  
Attorney General, State of New York  
Attorney for Defendants-Appellees,  
The Capitol,  
Albany, New York 12224

by depositing the same, properly enclosed in a securely-sealed,  
post-paid wrapper, in a Branch Post Office regularly maintained by  
the United States Government at 350 Canal Street, Borough of Manhattan,  
City of New York, addressed as above shown.

Sworn to before me this  
7th day of January, 1976

*Rose Rinella*  
.....

*John V. D'Esposito*  
JOHN V. D'ESPOSITO  
Notary Public, State of New York  
No. 30-0932350  
Qualified in Nassau County  
Commission Expires March 30, 1977